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VIA FAX

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VIA HAND DELIVERY

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Re: East Helena CERCLA Site

Dear Mr. Wardell and Ms. Bohan:

ARCO appreciates the Agency's willingness to meet with us to discuss ARCO's potential liability for the East Helena CERCLA site and alternatives for resolution of this matter. In preparation for our May 22 meeting, we are providing you with background information concerning The Anaconda Company's activities at the East Helena CERCLA site (the "Site") and ARCO's opportunity to participate in the CERCLA process at the Site to date. Additionally, this letter responds to Ms. Bohan's May 15, 1990 letter addressing ARCO's liability at the Site and proposes an alternative for resolving ARCO's alleged liability.

I. OVERVIEW OF THE ANACONDA COMPANY'S ACTIVITIES AT THE SITE

The Anaconda Company ("TAC") operated a zinc fuming plant at the Site from 1927 through 1972. TAC did not own any land at the Site but rather leased a relatively small tract of land from ASARCO for its zinc fuming operations.

The zinc fuming plant reprocessed slag generated from ASARCO's lead smelter for the purpose of producing zinc oxide. Molten slag from the smelter was delivered to the zinc fuming facility in five ton ladles, or cold slag was obtained from ASARCO's slag pile. Pursuant to an agreement with ASARCO, TAC had the right to remove up to a maximum of 250 tons/day of cold dump slag (or in certain limited instances up to 450 tons/day) for treatment in its zinc fuming plant. TAC did not own the slag dump from which cold slag

was taken for processing, or any other slag at the facility; ASARCO retained ownership of and control over the slag.

No chemical constituents were used in the process, except for pulverized coal which was used to provide fuel for the firing of the blast furnace and molten or granulated cold slag which originated from the ASARCO smelter. Slag was heated to high temperature in the blast furnace, which fumed the zinc. The hot vaporized zinc was then cooled and mixed with outside air to form the product zinc oxide. The zinc oxide was captured in a very efficient baghouse, and the cleaned gasses were vented to the stack. Treated slag remained the property of ASARCO during and following the fuming process and was disposed of onsite at ASARCO's direction.

The zinc fuming plant used non-contact cooling water from the Lower Lake for its blast furnace operations. Cooling water was pumped from Lower Lake through a closed transport piping system to non-contact cooling cells in the furnace, and then discharged back to the Lower Lake through a closed piping system. The cooling water was used in the furnace on a once-through basis. Since the cooling system was a non-contact system, metals did not enter the non-contact cooling water from the zinc fuming plant.

TAC sold the zinc fuming plant to ASARCO in 1972 and cancelled its lease with ASARCO at the same time. ASARCO continued to operate the zinc fuming plant until 1982.

Pursuant to a 1958 agreement entered into between TAC and ASARCO entitled the "Residues and Lead Concentrates Treatment Contract" (the "1958 Contract"), TAC delivered valuable residues from its electrolytic zinc plants at Great Falls and Anaconda and valuable lead concentrates from the zinc concentrating mill at Anaconda to ASARCO for processing. All residues and lead concentrates delivered under the 1958 Contract were delivered f.o.b. railroad cars at unloading bins at ASARCO's East Helena facility. The 1958 Contract provided for a "base treatment charge" for residues and concentrates which TAC paid to ASARCO, and payments for "returnable metals" which ASARCO made to TAC. Additionally, the 1958 Contract provided for the delivery of refined lead product to Anaconda f.o.b. railroad cars at ASARCO's refinery in Omaha, Nebraska. ASARCO maintained ownership and control of slag under the 1958 Contract. The 1958 Contract terminated in 1973.

ASARCO has indicated that process wastewater from the lead smelter was not discharged into Lower Lake until 1975, after the termination of the 1958 Contract. We understand that ASARCO has

in the past processed, and may continue to process, valuable residues and concentrates from national and foreign facilities. EPA has not named any of these suppliers of residues and concentrates as potentially responsible parties for the Process Ponds Operable Unit.

II. ARCO HAS NOT HAD AN ADEQUATE OPPORTUNITY TO PARTICIPATE IN THE CERCLA PROCESS AT THE SITE

As we have indicated to Ms. Bohan and her predecessor on this matter Sandra Moreno, ARCO was surprised and dismayed to receive Special Notice for the Process Ponds Operable Unit after having been excluded from the RI/FS process. Our participation in this matter to date is summarized below.

Even though the East Helena site was listed on the interim National Priorities List in August of 1982, and numerous RI related studies were already underway, ARCO did not receive a CERCLA Section 104(e) request for information from the Agency until March of 1987. On April 10, 1987, ARCO responded to this request and requested information from EPA relating to numerous past studies conducted at the site under CERCLA. We have yet to receive a response to our April 10, 1987 request for information.

On October 13, 1987, Robert Dent of ARCO telephoned Sandra Moreno to inquire about the status of ARCO's CERCLA Section 104(e) response. At that time, Ms. Moreno stated to Mr. Dent that EPA was negotiating an administrative order on consent with ASARCO for additional RI/FS studies. Ms. Moreno further indicated that EPA considered ASARCO to be the primary PRP at the East Helena Site and that there was no need for EPA to pursue other PRPs.

We did not hear from EPA again until almost one year later, when ARCO received a September 22, 1988 letter from the Agency inviting ARCO to participate in discussions between EPA and ASARCO on the same administrative order on consent proposed the previous year. ARCO was never invited to participate in discussions between ASARCO and EPA until we received the September 22, 1988 letter. A meeting was scheduled for September 29 and 30, 1988 to discuss the proposed order.

ARCO sent its legal counsel, Jim Spaanstra, to the September 29, 1988 meeting only to have him politely asked not to participate in the discussions between ASARCO and EPA. ASARCO's basis for requesting that Mr. Spaanstra not attend the meeting was that certain private contractual relationships between ASARCO and ARCO made ARCO's presence superfluous. In a letter dated March 15, 1989 to ARCO's counsel Robert Lawrence, Ms. Moreno indicated that Mr.

Spaanstra was excluded from the meeting because "ASARCO, the only participating potentially responsible party, requested that the negotiations be kept confidential." Mr. Spaanstra deferred to EPA's and ASARCO's request and left the meeting.

ARCO heard nothing further from the Agency during negotiations of the RI/FS Consent Order. When Administrative Order on Consent Docket No. CERCLA VIII-89-10 between the Agency and ASARCO was released for public comment, EPA did not provide ARCO with notification. See ARCO's February 16, 1989 letter requesting an extension of the public comment period. By letter dated March 15, 1989, EPA denied ARCO's February 16 request for an extension of the public comment period. At the same time, the Agency indicated that "even though the public comment period has terminated, that does not mean that the Agency would not welcome any comments you may have and, if possible, would incorporate these ideas into implementation of the Consent Order."

EPA issued its Proposed Plan for the Process Ponds Operable Unit in late August 1989. ARCO was not informed of the issuance of the Proposed Plan, and did not receive a copy of the Proposed Plan from EPA, until September 12, 1989, the date of the public meeting on the Plan in East Helena. ARCO did not receive a copy of the RI/FS for the Process Ponds Operable Unit until September 15, 1989, three working days prior to the expiration of the public comment period. The RI/FS was not available in the EPA Region 8 library or other public repositories within the Denver metro area. The Agency did not publish notice of the availability of the Proposed Plan or the RI/FS in the Denver metro area. ARCO therefore requested an extension of the public comment period until October 6, 1989. See September 20, 1989 letter from Mr. Lawrence to Ms. Moreno. Additionally, ARCO provided limited preliminary comments to EPA following Ms. Moreno's representation that the public comment period likely would not be extended. By letter dated October 17, 1989, EPA denied ARCO's request for an extension of the public comment period.

ARCO did not hear anything further from the Agency until February 21, 1990 when Ms. Moreno informed Mr. Lawrence that the Agency intended to issue a Special Notice Letter to Anaconda for the Process Ponds Operable Unit and past response costs. Mr. Lawrence requested that ARCO have an opportunity to meet with EPA prior to issuance of the Special Notice Letter. Ms. Moreno stated that she was unable to delay issuance of the Special Notice Letters for a meeting with ARCO. EPA issued a Special Notice Letter to Anaconda Minerals Company on February 23, 1990.

EPA met with ARCO and ASARCO for the first time under the Special Notice Letter on March 22, 1990. During this meeting, ARCO requested: 1) that the Agency provide ARCO with the basis for its alleged liability for the Process Ponds Operable Unit; and 2) that the Agency provide cost documentation for over a million dollars in past response costs that was not included in the Special Notice Letter. Mr. Brown responded that ARCO's liability was premised upon fallout from air emissions from the zinc fuming facility to the Lower Lake, and upon certain information from ASARCO indicating that TAC had contributed to contamination in the Lower Lake. Neither ASARCO nor EPA, however, was able to provide ARCO with any documentation supporting liability under either of these theories. As will be discussed further below, we have yet to see any documentation demonstrating that TAC contributed to or exacerbated contamination in the Lower Lake as a result of its operation of the zinc fuming facility. Mr. Goodstein, the Department of Justice's representative, indicated that EPA and DOJ would attempt to provide the parties with the missing cost documentation in the near future.

On April 18, 1990, counsel for EPA, ASARCO and ARCO met for preliminary discussion on the Agency's draft Consent Decree. ARCO expressed numerous concerns with the decree, as set forth in ARCO's April 17, 1990 letter to the Agency. On April 25, 1990, ARCO provided EPA with a letter setting forth the basis for ARCO's position that it should not be considered a PRP for the Process Ponds Operable Unit. ARCO also requested a 30 day extension of the May 1, 1990 deadline to submit a good faith offer. ARCO did not receive a response to its extension request, and thus submitted a good faith offer to the Agency on May 1. On May 14, 1990, EPA determined that ARCO's May 1 offer constituted a good faith offer. Also on May 14, Mr. Lawrence and Mr. Dent met with Ms. Bohan and Mr. Brown (via telephone) to explain ARCO's position that it should not be considered a PRP. During that meeting, Ms. Bohan indicated that ARCO's liability was premised on three theories: 1) TAC's discharge of wastewater to Lower Lake; 2) fallout from air emissions from the zinc fuming plant; and 3) and arrangement for treatment and disposal of residues and concentrates at ASARCO's smelter.

On May 15, 1990, EPA met with ARCO and ASARCO to further discuss the Consent Decree. Ms. Bohan indicated that the Agency still did not have the missing cost documentation which ARCO and ASARCO had requested on March 22. Ms. Bohan also provided ARCO with a letter setting forth the Agency's position on ARCO's PRP status. Our response to Ms. Bohan's May 15 letter is set forth below.

To summarize, ARCO did not have an adequate opportunity: 1) to participate in the RI/FS process; 2) to participate in RI/FS Consent Order negotiations between ASARCO and EPA; 3) to comment on the Consent Order; and 4) to comment on the Proposed Plan and RI/FS. ARCO's representative was asked to leave negotiations on the RI/FS Consent Order. The Agency denied ARCO's request for an extension of the public comment period on the Consent Order and the Proposed Plan. The Agency refused to meet with ARCO prior to the issuance of the Special Notice Letter, and then issued the Special Notice Letter without adequate supporting cost documentation.

We appreciate the recent efforts of Ms. Bohan and Mr. Brown to address ARCO's alleged liability and to respond to ARCO's concerns, and your willingness to meet with us to discuss the Site. Nevertheless, based upon our knowledge of TAC's activities at the Site and our experiences with the Agency and ASARCO prior to the issuance of the Special Notice Letter, we had every reason to believe that the Agency would not look to ARCO as a PRP for the Process Ponds Operable Unit.

III. ARCO SHOULD NOT BE CONSIDERED A PRP FOR THE PROCESS PONDS OPERABLE UNIT

As noted above, ARCO provided the Agency with the basis for its position that it should not be considered a PRP for the Process Ponds Operable Unit on April 25, 1990. ARCO submitted affidavits from plant personnel supporting its position on April 26, 1990. ARCO's April 25, 1990 letter is attached hereto as Exhibit A.

Ms. Bohan's May 15 letter in response to ARCO's April 25 letter provides that,

> EPA's decision to issue a Special Notice letter to ARCO as a potentially responsible party for the Process Ponds Operable Unit is supported by information regarding: air emissions from the zinc smelter; Anaconda's discharge of wastewater to Lower Lake; and Anaconda's arrangement for treatment and disposal at ASARCO's lead smelter.

As discussed below, ARCO believes that EPA's determination that ARCO should be considered a PRP for the Process Ponds Operable Unit is based upon erroneous information or illogical assumptions and conclusions.

A. No Credible Evidence Exists Linking Fallout from Air Emissions from the Zinc Fuming Plant to the Contamination in the Lower Lake. EPA's theory of liability, as expressed in the May 15 letter and the Agency's May 14 meeting with ARCO, is that fallout

from zinc fuming plant air emissions resulted in contamination of the Lower Lake. The Agency's position apparently is based on the "close proximity" of the zinc fuming plant to the Lower Lake. The Agency assumes, based on this proximity and the size of the Lower Lake, that "contamination of the ponds from fallout is considered to be substantial."

Mere conjecture is not sufficient to establish liability under CERCLA. Decisions have firmly established that the Agency has the burden of proving liability under CERCLA. To date, the Agency has failed to provide ARCO with any evidence of fallout contaminating Lower Lake. We have not uncovered any such evidence in diligently reviewing our files or the investigatory reports prepared for EPA by ASARCO.

A number of factors could influence whether contaminated sludges in Lower Lake did result, in fact, from fallout from zinc fuming plant air emissions. These factors include, without limitation, wind direction, particle size, proximity of the Lower Lake to the zinc fuming plant, rate of settling of the particles in Lower Lake, and metal retention in Lower Lake. We understand that Lower Lake discharged to Prickly Pear Creek on occasion until 1975. Contribution of air emissions to Lower Lake was not identified as a pathway of concern in the RI/FS. We are not aware of any analyses or modeling performed by EPA or ASARCO linking the sludges in Lower Lake to fallout from the zinc fuming plant. Certainly contamination of the ponds from fallout, if any, would not be "substantial," particularly in comparison with releases of process water, acid plant blowdown water, and contaminated groundwater to the Lower Lake from ASARCO's lead smelter operations.

B. <u>Discharges of Non-contact Cooling Water from the Zinc Fuming Plant Did Not Contribute To or Exacerbate Contamination in the Lower Lake</u>. ARCO's April 25 letter and supporting affidavits describe in detail ARCO's position that TAC only discharged non-contact cooling water to Lower Lake, and that discharges of the non-contact cooling water did not contribute to or exacerbate contamination in Lower Lake. ARCO's position is further supported by ASARCO's April 16, 1990 response to the Agency's information request, which states that,

> ASARCO has been unable to locate any records or documentation which confirm "contact water" was either produced or used in any manner by the zinc fuming facility at any time during the course of its existence from 1927-1972.

Nevertheless, EPA has concluded that "the water being discharged from the zinc plant collected metals as it was run through the plant."

No plausible basis exists for the Agency's conclusion. ARCO provided EPA with 1970 sampling data indicating that the quality of the non-contact cooling water discharged to Lower Lake from the zinc fuming facility during TAC's operations was substantially similar, if not identical, to a sample taken from Prickly Pear Creek. ARCO also provided affidavits from TAC personnel stating that contamination of the non-contact water did not occur. To support its conclusions, the Agency relies on "elevated concentrations of heavy metals in water being discharged to Lower Lake", and the "relatively low levels of metals in Prickly Pear Creek above Lower Lake."

The Agency has missed ARCO's point. ARCO's position is that the non-contact cooling water discharged from the zinc fuming plant was the same quality as the water that was withdrawn from Lower Lake. No contaminants were added to Lower Lake by the non-contact cooling water system. Even assuming that the non-contact discharge water contained elevated concentrations of metals, no evidence exists that these metals were added by the non-contact cooling water system. Rather, the concentrations of metals discharged in the non-contact cooling water were the same as those in the withdrawal water from Lower Lake.

The reference in Ms. Bohan's letter to "relatively low levels of metals in Prickly Pear Creek" to support EPA's theory that the non-contact cooling water collected metals as it ran through the zinc fuming plant is puzzling. From our May 14 meeting with Ms. Bohan and Mr. Brown, we assume that this reference to the quality of Prickly Pear Creek water is in support of the following theory: 1) Prickly Pear Creek water did not contain elevated concentrations of metals when it entered Lower Lake; 2) ASARCO did not discharge process waters to the Lower Lake prior to 1975; 3) elevated metals concentrations in Lower Lake (and thus in the non-contact cooling water discharge) must have come from somewhere; and 4) if ASARCO did not discharge process water to Lower Lake prior to 1975, and if Prickly Pear Creek only contained relatively low concentrations of metals, than discharges of cooling water from the zinc fuming plant must have contributed to contamination in Lower Lake.

In response, the 1970 data ARCO provided to the Agency show that Prickly Pear Creek Water was substantially identical to discharge water from the non-contact cooling water system. For all parameters other than calcium and copper, samples from the non-contact cooling water discharge were less than or equal to Prickly

Pear Creek water. The non-contact cooling water sample results for calcium and copper were only 8 ppm and .01 ppm higher than the Prickly Pear Creek water sample results, respectively. We are not aware of any data collected during the period of TAC operations showing that Lower Lake had substantially higher metals concentrations than Prickly Pear Creek.

Even assuming for purposes of discussion that Lower Lake had higher metals concentrations than Prickly Pear Creek, no credible evidence exists that the zinc fuming plant was the source of the higher metals concentrations. The Agency apparently has chosen to disregard the fact that Prickly Pear Creek may have contributed metals to Lower Lake. These "relatively low levels" of metals are essentially equivalent to the metals discharged in TAC's non-contact cooling water. Additionally, the Agency has not recognized contaminated groundwater or surface water runoff from ASARCO's operations as a possible source of contamination of Lower Lake. A February 25, 1989 Memorandum from EPA's consultant CH2M Hill, attached to the Process Ponds RI/FS, provides,

> Of the additional sources of water identified by ASARCO to account for the 70 gpm gain in discharge over intake only the 40 gpm of groundwater was assumed to be a significant source of arsenic. Using the arsenic concentration of 53 mg/l reported for the June 1987 sample from DH-19 (the closest well to the groundwater drain identified by ASARCO) accounts for about 2.1 billion mg or about 80% of the arsenic being added to the Lower Lake over a 6 month period.

ARCO recognizes that the specific groundwater discharge to Lower Lake discussed above was part of ASARCO's process fluids circuit. Nevertheless, the RI/FS identifies groundwater as a source of contamination for Lower Lake.

Finally, we have been unable to verify whether ASARCO discharged contaminated process water to the Lower Lake prior to 1975. We are aware that acid plant wastewater was discharged to Lower Lake, but have not determined the date when such discharges began.

The Agency may be relying on a single 1975 sample of cooling water inflow and outflow provided by ASARCO for its conclusion that water discharged from the zinc fuming plant collected metals as it was run through the plant. The 1975 sample was taken after ASARCO assumed ownership and operation of the zinc fuming plant. Engineering drawings HG-4 and -5, which ASARCO provided to EPA in its April 16, 1990 response to the Agency's information request,

show that both intake and outflow non-contact cooling water flowed through pipes directly from and to Lower Lake while TAC operated the zinc fuming plant. ASARCO may have changed this configuration, and used an open flume and ditch for the outflow discharge to Lower Lake. This may account for the slight increase in concentrations of metals in the outflow water in ASARCO's 1975 sample.

Further, the increase of constituents in outfall versus intake in ASARCO's 1975 sample is .01 ppm copper, .1 ppm lead, .1 ppm zinc, and .002 ppm arsenic. Levels of cadmium remained the same. We are unable to determine from our copy of the sample results whether iron levels remained the same or increased by .2 ppm. In any event, no constituent levels increased by even as little as 1 ppm. The alleged increase for arsenic was 2 ppb. ASARCO has not provided any QA/QC information for its samples. Particularly in 1975, increases of constituents in the parts per billion range must be subject to question.

The Agency should not rely upon the single 1975 sample analysis provided by ASARCO to support a conclusion that non-contact cooling water collected metals as it passed through the zinc fuming plant, in the face of overwhelming evidence to the contrary. ARCO respectfully requests that the Agency reconsider its position on whether the zinc fuming plant contributed to or exacerbated contamination in Lower Lake.

C. TAC Did Not "Arrange for Disposal" of Hazardous Substances under the 1958 Contract.

In these circumstances, ARCO is not liable pursuant to § 107(a)(3) of CERCLA under the theory that TAC "arranged for disposal" of hazardous substances. Under the 1958 Contract, TAC sent residues and lead concentrates to ASARCO for treatment by ASARCO. TAC paid ASARCO a price for treatment and ASARCO in most instances paid for the metals obtained from treatment. In limited circumstances with respect to refined lead, ASARCO returned a certain percentage of refined metal to TAC. Clearly, the residues and lead concentrates were useful and valuable materials that were not intended for disposal, but rather processing. As the court stated in Prudential Insurance Co. of America v. United States Gypsum, 711 F. Supp. 1244 (D.N.J. 1989):

> Looking at the term disposal in the context of the statute, however, it is clear that liability attaches to a party who has taken an affirmative act to dispose of a hazardous substance, that is, "in some manner the defendant must have dumped his waste on the site at

> issue," as opposed to convey a useful substance for a useful purpose.

Id., quoting Jersey City Redevelopment Authority v. PPG Industries, 655 F. Supp. 1257 (D.N.J. 1987), aff'd, 866 F.2d 1411 (3d. Cir. 1988). See also Kelley v. Arco Industries Corp., 19 Chem Waste Lit. Rep. 1342 (W.D. Mich.1990). In the transaction at issue, TAC conveyed a useful substance to ASARCO for a useful purpose: namely, valuable concentrates and residues for recovery of valuable minerals. Anaconda did not enter into the contract in order to dispose of hazardous substances. See United States v. Westinghouse Electric Corp., 22 E.R.C. 1230 (S.D. Ind. 1983). C.f. New York v. General Electric Co., 592 F. Supp. 291 (N.D.N.Y. 1984).

In ARCO's May 14 meeting with the Agency, Ms. Bohan suggested that ARCO was liable for Anaconda's activities under United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989). That case, however, is distinguishable. In Aceto, the defendants hired a "formulator" to formulate their technical grade pesticides into commercial grade pesticides. The formulator mixed the manufacturer's active ingredients with inert materials using specifications provided by the manufacturer. The resulting product was then packaged by the formulator and either shipped back to the manufacturer or shipped directly to customers of the manufacturer. The manufacturer retained ownership of the materials throughout the formulation process.

The degree of control exercised by the manufacturers in Aceto clearly was not present under the 1958 Contract between TAC and ASARCO. First, nothing in the 1958 Contract specifies the process that ASARCO was to use to treat the residues and concentrates. The contract merely provides that ASARCO was to treat the materials for an established charge. TAC did not control the treatment process, and particularly did not exercise control over disposal of waste materials from the lead smelter. Second, ARCO believes that ownership of the materials passed to ASARCO under the terms of the 1958 Contract. The contract provides that TAC shall deliver the residues and concentrates "f.o.b. railroad cars at unloading bins of the plant of ASARCO at East Helena, Montana." It further provides that refined lead returned to TAC under the contract will be delivered "f.o.b. railroad cars at [Anaconda's] refinery in Omaha, Nebraska. . . ." These terms suggest that title to the materials passed to ASARCO at the time of delivery in East Helena. In summary, TAC did not have nearly the degree of supervision and control as did the defendants in Aceto.

Finally, Ms. Bohan's May 15, 1990 letter states,

> Inherent in the contract for treatment was an arrangement for disposal of hazardous substances to the Process Ponds because wastewater from the treatment of materials sent to ASARCO by Anaconda were disposed of in the ponds. (Emphasis added.)

This statement is incorrect. The 1958 Contract terminated in 1973 pursuant to a 1972 Purchase and Sale Agreement between TAC and ASARCO. (We have previously provided the Agency with a copy of the 1972 Agreement.) The Agency and ASARCO have informed us that process wastewater from ASARCO's facility was not disposed of in the Lower Lake prior to 1975, although we have been unable to verify this. Assuming that ASARCO did not discharge wastewater to the Lower Lake prior to 1975, wastewaters from the treatment of residues and concentrates sent to ASARCO by TAC could not have been disposed of in the Lower Lake. The 1958 Contract for delivery of residues and concentrates to ASARCO terminated over two years before the 1975 discharge to Lower Lake.

For the above reasons, ARCO vigorously contests the Agency's assertion that TAC "arranged for disposal" of hazardous substances.

We understand that other national and foreign companies have in the past and may continue to ship residues and concentrates to ASARCO at the East Helena facility for treatment. The Agency has not indicated to us to date that it intends to pursue such parties. ARCO requests that EPA inform us of the identities of any such parties and the Agency's intent with respect to pursuing such parties as PRPs for the Site.

D. CERCLA Does Not Impose Liability on Successor Corporations. Ms. Bohan's May 15 letter reiterates the government's position that CERCLA imposes liability on successor corporations. Even assuming for the sake of argument that the government's position is correct from a public policy standpoint, it ignores the plain language of the statute.

Successor corporations are not listed as potentially responsible parties under Section 107(a) of CERCLA. Successor corporations are not included within the definition of "person" set forth in Section 101(21) of CERCLA. Moreover, federal courts are not authorized to create a federal common law of successor liability at will under well settled principles of law. See Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). Federal courts are authorized to formulate federal common law rules in certain "few and restricted areas." Wheeldin v.

Wheeler, 373 U.S. 647, 651 (1963). The federal courts limited authority "falls into essentially two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." Texas Industries, 451 U.S. 630, 640. The instant case certainly does not involve unique federal interests. Congress has not given the federal courts the power to create federal common law rules of successor liability under CERCLA.

Contrary to the government's position, CERCLA's statutory limitation on liability cannot be ignored simply to further remedial action. Further, recognition of successor corporation liability is not necessary for CERCLA's effective implementation. As one commenter has suggested,

> . . . Congress recognized that situations might arise where no party could be held responsible for cleanup costs. Rather than place liability on successor corporations whose connection to the health hazard would be tenuous, Congress created a Superfund to cover those situations.

Barnard, EPA's Policy of Corporate Successor Liability Under CERCLA, 6 Stan. Env.L.J. 78, 106 (1986-1987). In circumstances such as exist here, where a viable current owner/operator has been identified as a PRP, the Agency need not even look to the Superfund to effectuate cleanup under CERCLA.

For the reasons set forth above, ARCO respectfully requests that the Agency reconsider its determination to pursue ARCO as a PRP for the Process Ponds Operable Unit.

IV. ARCO'S PROPOSED ALTERNATIVE FOR RESOLUTION OF ARCO'S LIABILITY AT THE SITE

Given the lack of evidence indicating that TAC contributed to contamination in the Lower Lake through discharge of non-contact cooling water or fallout from air emissions, the highly questionable legal and factual basis for EPA's position that TAC arranged for disposal under the 1958 Contract which terminated in 1973 (particularly if ASARCO's position that the lead smelter did discharge process water to Lower Lake to 1975 is correct) and the recent case law on successor liability, ARCO believes that its exposure to liability for the Process Ponds Operable Unit in litigation would be minimal. Nevertheless, we have incentives at least equal to the Agency's to minimize our transaction costs and to direct our resources to other Superfund sites in the Region.

We believe it would be in the best interest of all the parties and the public for ARCO to resolve its alleged liability in a final manner for past and future response activities with respect to the Site, so that cleanup may proceed.

We therefore propose that ARCO and the Agency pursue a de minimis settlement for the Site. A de minimis settlement of this matter would be appropriate under Section 122(g)(1)(A) of CERCLA, EPA's December 20, 1989 guidance on "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements" (OSWER Directive 9384.7-1B) (the "December 1989 Guidance"), and EPA's guidance on "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA", 52 Fed. Reg. 43393 (June 30, 1987)(OSWER Directive # 9834.7) (the "June 1987 Guidance").

Under Section 122(g)(1)(A) of CERCLA, EPA is required "as promptly as possible" to reach a settlement if "such settlement involves only a minor portion of the response costs at the facility concerned" and the following conditions are met:

> Both of the following are minimal in comparison to other hazardous substances at the facility: i) The amount of the hazardous substances contributed by that party to the facility; ii) The toxic or other hazardous effect of the substances contributed by that party to the facility.

These conditions clearly are met with respect to TAC's activities at the Site. As discussed above, ARCO does not believe that TAC's zinc fuming plant contributed to or exacerbated contamination in Lower Lake. If fallout from air emissions from the zinc fuming plant did actually occur at the Site, such fallout would be minimal in comparison to the amount of hazardous substances contributed to the site by ASARCO's operations.

Further, the toxic or other hazardous effect of hazardous substances, if any, contributed by TAC's activities at the Site are minimal in comparison to other hazardous substances at the Site. EPA has interpreted the term "minimal in comparison" in the context of toxicity to mean "not significantly more toxic than . . ." See June 1987 Guidance and December 1989 Guidance.

Additionally, a de minimis settlement of this matter would be "practicable and in the public interest." Section 122(g)(1) of CERCLA. The December 1989 Guidance provides that EPA should make this determination,

through an evaluation of the strength of the overall case including that against viable non-de minimis parties and the impact a de minimis settlement would have on the major party settlement and litigation.

We believe ARCO has a strong factual and legal defense to liability for the Site as a whole and particularly for the Process Ponds Operable Unit. Moreover, contributions of hazardous substances from TAC activities to other operable units at the Site, if any, compared to contributions of hazardous substances to other operable units from ASARCO's operations clearly would be minimal. Given the fact that ASARCO has been the owner/operator of the facility for the past century, the Agency would appear to have virtually a bullet-proof case against a viable non-de minimis party. We have no indication that a de minimis settlement would have a negative impact on major party settlement. In fact, a de minimis settlement with ARCO may encourage settlement with ASARCO.

We anticipate that a de minimis settlement would be for a sum certain agreed upon between ARCO and the Agency. In exchange, the de minimis settlement would resolve ARCO's liability for all past and future response activities at the entire Site, including past and future response costs. ARCO would expect the de minimis settlement to include a covenant not to sue in accordance with Section 122(g)(2) of CERCLA and contribution protection pursuant to Section 122(g)(5) and Section 113(f)(2) of CERCLA.

We respectfully request that the Agency consider a de minimis settlement as a means of facilitating settlement of this matter. At your request, ARCO will prepare a specific de minimis settlement proposal for submittal to the Agency.

ARCO would very much like to resolve this matter as soon as possible. We appreciate your consideration of this letter, and look forward to your response.

Sincerely,

Jeffrey H. Desautels
Sr. Attorney

cc: Michael Goodstein, Esq.
Thomas Eggert, Esq.
Mr. Scott Brown
Jody Crane, Esq.
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